MCI Communications Corporation

1801 Pennsylvania Avenue, NW
Washington, DC 20006

October 24, 1996

ORIGINAL

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: **Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996; CC Docket No. 96-187**

Dear Mr. Caton:

Enclosed herewith for filing are the original and sixteen (16) copies of MCI Telecommunications Corporation's Reply Comments regarding the above-captioned matter.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI Reply Comments furnished for such purpose and remit same to the bearer.

Sincerely yours,

Alan Buzacott
Regulatory Analyst

Enclosure
AB

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of Section 402(b)(1)(A)	)	**CC Docket No. 96-187**
of the Telecommunications Act of 1996	)	
	)	

MCI REPLY COMMENTS

Alan Buzacott
MCI Telecommunications Corp.
1801 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 887-3204

October 24, 1996

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SUMMARY

In its initial comments, MCI showed that the most rational interpretation of the "deemed lawful" language in Section 204(a)(3) of the Act is that it establishes higher burdens for suspension and investigation. With the exception of the incumbent LECs, commenting parties agree with this position. Support for interpreting "deemed lawful" as according LEC tariffs only a presumption of lawfulness is not limited to the incumbent LECs' competitors and interexchange carrier customers, but extends to large users of telecommunications services, NECA, and an incumbent LEC as well.

As several commenters note, dictionary definitions of "deemed" can imply a conditional presumption. In addition, Congress's decision to characterize the tariff review process established by Section 204(a)(3) as "streamlined" is a clear reference to the Commission's past use of the same term to refer to tariff review procedures that incorporate the presumption of lawfulness. Finally, the legislative history supports the view that Congress intended Section 204(a)(3) only to speed up the tariff review process by establishing higher burdens for suspension and investigation.

By contrast, there is no evidence in either the statutory language or the legislative history that Congress intended to foreclose customers' remedies. Significantly, the incumbent LECs' proposed interpretation of Section 204(a)(3) is inconsistent with Section 204(a)(1). Because the incumbent LECs' interpretation would foreclose the complaint remedy, petitioners would have the right to seek judicial review of a Commission decision not to suspend. However, Section 204(a)(1) of the

Communications Act contains no standards that would guide the Commission in exercising its suspension authority and the courts in reviewing that authority. Because the Commission must, as a matter of statutory construction, adopt the interpretation of "deemed lawful" that is most consistent with other provisions of the statute, the Commission may not interpret "deemed lawful" to change the legal status of tariffs allowed to go into effect without suspension.

The incumbent LECs' comments fail to address the consequences of the creation of a right to judicial review of Commission decisions not to suspend. BellSouth is the only incumbent LEC to even acknowledge that a Commission decision not to suspend would be judicially reviewable, but it does so only in a footnote and does not discuss the implications of judicial review.

The Commission should not apply the Section 1.773 suspension standard to incumbent LEC tariffs. Commenters emphasize that incumbent LEC tariffs should be presumed lawful, but that the suspension standard should reflect the incumbent LECs' continued market power. Because competition is not sufficient to ensure that incumbent LEC tariffs are lawful, petitioners should only be required to demonstrate the simple "probability" that a tariff would be found unlawful or that it is "more likely than not" that a tariff would be found unlawful.

There is also substantial agreement that Section 204(a)(3) only prescribes particular notice periods for rate increases and decreases. Transmittals that introduce new services or change terms and conditions involve neither a rate increase nor a rate decrease, and therefore are not subject to the 7/15 day notice periods specified in Section

204(a)(3). Nothing in Section 204(a)(3) requires the Commission to reduce the current 45-day notice period for these tariffs.

The Commission should reject the incumbent LECs' argument that it should look at the overall effect on the API for a service category or basket to determine if a tariff filing should be classified as an increase or decrease. This interpretation would result in some customers facing rate increases on only seven days' notice, undermining the added protection that Congress intended for customers facing rate increases.

It is clear that Congress did not intend Section 204(a)(3) to apply to nondominant providers of interstate access services. If, however, the Commission determines that Section 204(a)(3) does apply to all LECs, it should use its Section 10(a) authority to forbear from applying Section 204(a)(3) to nondominant providers of interstate access services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Implementation of Section 402(b)(1)(A)	)	**CC Docket No. 96-187**
of the Telecommunications Act of 1996	)	
	)	

MCI REPLY COMMENTS

I. Introduction

MCI Telecommunications Corporation, pursuant to the Notice of Proposed Rulemaking in the above-captioned docket,[1] hereby submits its Reply Comments. In the Notice, the Commission asked for comment on rules to implement Section 402(b)(1)(A) of the Telecommunications Act of 1996.[2] On October 9, 1996, 28 parties filed comments. In this reply, MCI responds to comments on the proper interpretation of "deemed lawful," the types of tariffs subject to streamlined treatment, and several other issues.

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[1]Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, FCC 96-367, released September 6, 1996 (Notice).

[2]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

II. "Deemed Lawful" Accords Incumbent LEC Tariffs Only the Presumption of Lawfulness

With the exception of the incumbent LECs, commenting parties agree that the most logical interpretation of the "deemed lawful" provision in Section 204(a)(3) is that it establishes higher burdens for suspensions and investigations.[3] Support for this interpretation is not limited to the incumbent LECs' competitors and interexchange carrier customers, but extends to large users of telecommunications services,[4] NECA,[5] and an incumbent LEC[6] as well. These parties emphasize that it is clear that Congress intended Section 204(a)(3) only to speed up the pre-effective review of LEC tariffs.[7]

On the other hand, the incumbent LECs, with the exception of Ameritech, argue that the "deemed lawful" language in Section 204(a)(3) was intended to change the legal status of LEC tariffs that become effective without suspension and investigation.[8] They claim that tariffs allowed to go into effect without suspension would be equivalent to a tariff found lawful after full investigation by the Commission.[9] Accordingly, the

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[3]See, e.g., MFS Comments at 1-2; AT&T Comments at 5.

[4]Ad Hoc Comments at 3; GSA Comments at 5-6; Networks Comments at 5.

[5]NECA Comments at 2.

[6]Ameritech Comments at 5-9.

[7]See, e.g., Time Warner Comments at 5.

[8]See, e.g., SWBT Comments at 1-5.

[9]Pacific Telesis Comments at 7.

Commission would be precluded from awarding damages for the period prior to a determination that the previously lawful rate had become unlawful.[10] Some incumbent LECs believe that the "deemed lawful" language not only changes the legal status of tariffs that go into effect without suspension, but also accords tariffs a presumption of lawfulness when they are filed.[11]

A. "Presumed Lawful" Is Consistent With the Statutory Language and the Legislative History

The statutory language supports an interpretation of "deemed lawful" that would establish higher burdens for suspension and investigation. First, as several commenters discuss, dictionary definitions of "deemed" can imply a conditional presumption.[12] For example, AT&T notes that Black's Law Dictionary includes "consider," "believe," and "treat as if" as definitions for the verb "deem."[13] Even some incumbent LECs apparently recognize that "deemed" can mean "presumed." By arguing that Section 204(a)(3) accords a presumption of lawfulness to filed tariffs, in addition to changing their legal

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[10]See, e.g., Bell Atlantic Comments at 6.

[11]See, e.g., Pacific Telesis Comments at 2.

[12]Ameritech Comments at 9; AT&T Comments at 6 n.13.

[13]Id.

status when they become effective, Pacific, GTE, and U S West are conceding that "deemed" does not have to be read to imply a definite determination of lawfulness.[14]

Second, Congress's decision to characterize the tariff review process established by Section 204(a)(3) as "streamlined" is a clear reference to the Commission's past use of "streamlined" in the context of tariff review procedures. In both the Competitive Carrier and Price Cap proceedings, the Commission characterized a tariff review process as streamlined if it incorporated both 1) shortened notice periods, and 2) the presumption of lawfulness.[15] As Ameritech notes in its comments, "the Commission must assume that Congress was aware of this practice and had it in mind when it required the Commission to streamline its regulation of LEC tariffs."[16] Thus, the reference to "streamlined" tariff review procedures in the first sentence of Section 204(a)(3) supports the interpretation that "deemed lawful" was intended to accord the presumption of lawfulness to filed tariffs.

The legislative history also supports the view that Congress intended Section 204(a)(3) only to speed up the tariff review process by establishing higher burdens for suspension and investigation. As MCI noted in its initial comments, the Joint Explanatory Statement refers only to a streamlining of "procedures for revision" of LEC tariffs (emphasis added), and Senator Dole's statements on the floor of the Senate make

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[14]See, e.g., Pacific Telesis Comments at 4.

[15]See MCI Comments at 4.

[16]Ameritech Comments at 9 (citing Foti v. INS, 375 U.S. 217, 223).

clear that the purpose of the amendment that became Section 204(a)(3) was to "[s]peed up FCC action."[17]

B. The Incumbent LECs' Interpretation Is Inconsistent With Other Sections of the Act and Is Not Supported By the Legislative History

The LECs base their argument that Section 204(a)(3) was intended to change the legal status of tariffs that become effective without suspension on dictionary definitions of "deemed" that would imply a definite determination of lawfulness. However, as was noted above, dictionary definitions support equally the interpretation that "deemed lawful" accords a conditional presumption of lawfulness. The Commission must, as a matter of statutory construction, adopt the interpretation of "deemed lawful" that is most consistent with other provisions of the statute.

As MCI demonstrated in its initial comments, the incumbent LECs' proposed interpretation of Section 204(a)(3) is inconsistent with Section 204(a)(1).[18] Because the incumbent LECs' interpretation would foreclose the complaint remedy, Southern Railway[19] and Aeronautical Radio[20] require that petitioners would have the right to seek judicial review of a Commission decision not to suspend. However, Section 204(a)(1) of

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[17]MCI Comments at 5.

[18]MCI Comments at 6-9.

[19]Southern Railway Co. v. Seaboard Allied Milling Corp. et. al., 442 U.S. 444, 454.

[20]Aeronautical Radio v. F.C.C., 642 F.2d 1221, 1235.

the Communications Act contains no standards that would guide the Commission in exercising its suspension authority and the courts in reviewing that authority. Because the incumbent LECs' interpretation of Section 204(a)(3) would conflict with Section 204(a)(1), it is clear that Congress did not intend Section 204(a)(3) to change the legal status of tariffs allowed to go into effect without suspension.

The LECs' comments fail to address the consequences of the creation of a right to judicial review of Commission decisions not to suspend. BellSouth is the only LEC to even acknowledge that a Commission decision not to suspend would be judicially reviewable, but it does so only in a footnote and does not discuss the implications of judicial review.[21] BellSouth and the other LECs do not address the disruptive practical consequences of a regime in which ratepayers would be forced to seek review of every Commission decision to permit a tariff to go into effect. Nor do the LECs address the fact that the creation of a right to judicial review would substantially increase the Commission's workload by requiring it to explain every decision allowing a tariff to go into effect, in order to avoid reversal.

In addition, the LECs' proposed interpretation of "deemed lawful" is inconsistent with Section 402(b)(1)(B) of the 1996 Act, which amends Section 208(b) to shorten the deadline for the resolution of complaints. As MCI showed in its initial comments, the placement of the amendments to Sections 204 and 208 together in Section 402(b)(1) of

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[21]BellSouth Comments at 5 n.7.

the 1996 Act confirms that tariffs filed on a "streamlined basis" pursuant to Section 204(a)(3) remain subject to complaint remedies under Section 208(b).[22] Thus, the Commission may not interpret "deemed lawful" as exempting LEC tariffs from the Section 206-209 complaint process.

Not only is the LECs' interpretation inconsistent with other provisions of the statute, but there is no evidence to suggest that Congress intended Section 204(a)(3) to limit LEC customers' remedies. As Ameritech notes in its comments, "[s]urely, if Congress' only intent was to alter the damages remedy for tariffs allowed to go into effect, it would have so indicated in a more clear and direct fashion."[23] Further, as AT&T discusses, "[i]n order to conclude that § 402(b)(1)(A) was intended to bar claims for damages against LECs filing tariffs pursuant to that section, the Commission would have to presume that Congress rewrote more than a century of settled law by inference, via an amendment to a subsection of the Communications Act addressing not damages awards, but the Commission's power to suspend tariff filings."[24]

Finally, neither the Joint Explanatory statement or Senator Dole's floor statement makes any reference to foreclosing damages or to the Section 206-209 complaint process. As Sprint notes, "there is nothing in the provision itself nor in the legislative history that evidences a Congressional intent to overturn well established precedent that holds that an

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[22]MCI Comments at 9.

[23]Ameritech Comments at 8.

[24]AT&T Comments at 6.

effective tariff establishes only the legal rate and not the lawful rate."[25] The incumbent LECs' assertion that Congress intended to "dramatically alter existing tariff precedent"[26] is without foundation.

III. The Commission Should Not Apply the Section 1.773 Suspension Standard To Incumbent LEC Tariffs

In the Notice, the Commission does not discuss the showing that a petitioner would have to make to rebut the presumption of lawfulness, although it suggests that the tests contained in Section 1.773(a)(ii) and (a)(iv) of the Commission's rules would provide a model.[27] In its initial comments, MCI showed that nothing in the Act requires the Commission to adopt any of the tests in Section 1.773 of its rules to incumbent LEC tariffs filed pursuant to Section 204(a)(3).[28] There is substantial and widespread agreement on this point.[29]

Commenters emphasize that incumbent LEC tariffs should be presumed lawful, but that the standard for suspending incumbent LEC tariffs should reflect the incumbent LECs' continued market power. For example, AT&T notes that "applying the 'high

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[25]Sprint Comments at 3.

[26]GTE Comments at 9.

[27]Notice at ¶12.

[28]MCI Comments at 9-11.

[29]AT&T Comments at 8; McLeod Comments at 4; KMC Comments at 7; MFS Comments at 8.

probability' of unlawfulness criterion to LECs that retain substantial market power is clearly inconsistent with the factual premise of the §1.773 test."[30] Because competition is not sufficient to ensure that incumbent LEC tariffs are lawful, petitioners should only be required to demonstrate the simple "probability"[31] that a tariff would be found unlawful or that it is "more likely than not"[32] that a tariff would be found unlawful. Of course, the Commission could continue to apply the existing Section 1.773 test to within-band and below-cap filings by price cap LECs.

There is also widespread agreement that there are certain categories of tariffs that would be presumptively subject to rejection or suspension, such as those that are facially noncompliant with price cap rules or other Commission regulations.[33] Because Section 204(a)(3) forecloses the Commission's deferral authority for tariffs eligible for streamlined treatment, the Commission must ensure that each transmittal contains all necessary information when it is filed. Consequently, if a transmittal does not comply with the Commission's rate structure and cost support rules, the Commission must reject the transmittal without prejudice, and permit it to be refiled.

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[30]AT&T Comments at 8 n.15.

[31]MCI Comments at 11.

[32]AT&T Comments at 8.

[33]AT&T Comments at 12.

IV. The Act Prescribes Notice Periods Only For Rate Increases and Decreases

Section 204(a)(3) specifies that a tariff "shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission . . ." As most commenters recognize, it is clear that Section 204(a)(3) only prescribes particular notice periods for rate increases and decreases. Transmittals that introduce new services or change terms and conditions involve neither a rate increase nor a rate decrease, and therefore are not subject to the 7/15 day notice periods specified in Section 204(a)(3). Nothing in Section 204(a)(3) requires the Commission to reduce the current 45-day notice period for these tariffs.

That Section 204(a)(3) does not prescribe particular notice periods for new services or changes in terms and conditions is demonstrated by the incumbent LECs' inability to agree on which of the reduced notice periods, 7 or 15 days, should apply. For example, SWBT, Pacific Telesis and NYNEX assert that a new service is a price decrease, and may thus be filed on 7 days' notice, while GTE and US West assert just as confidently that a new service is a price increase. Similarly, Pacific Telesis argues that a change in terms and conditions qualifies as a rate decrease, while the other incumbent LECs apparently agree with the Commission that a change in terms and conditions is more like a rate increase. The incumbent LECs' confusion illustrates that Section 204(a)(3) does not prescribe any particular notice period for transmittals that do not involve rate increases or decreases.

Because Section 204(a)(3) does not require the Commission to reduce notice periods for new services or changes in terms and conditions, the Commission should continue to examine the issue of notice periods in the context of its price cap performance review. The Commission should also reject the incumbent LECs' proposals that it use this proceeding to eliminate or modify the cost support requirements for new services. Nothing in Section 204(a)(3) requires the Commission to address cost support requirements at this time, and this issue is also best addressed in the context of the price cap performance review.

V. Transmittals That Combine Rate Increases and Decreases Must Be Filed on 15 Days' Notice

Most commenters, including some incumbent LECs, support the Commission's tentative conclusion that the longer 15-day notice period should apply to transmittals that contain both rate increases and decreases.[34] Some incumbent LECs, however, argue that the Commission should look at the overall effect on the API for a service category or basket to determine if a tariff filing should be classified as an increase or decrease.[35] Pacific Telesis, for example, states that "it would be unreasonable to determine the effective date based on the movement of separate rate elements" because

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[34]See, e.g., BellSouth Comments at 14.

[35]NYNEX Comments at 21, SWBT Comments at 15, Pacific Telesis Comments at 20-21.

"[i]nterexchange access customers do not purchase separate rate elements; they purchase a whole service."[36]

A decrease in the API or other weighted average does not mean that a customer will see a rate decrease, even if it purchases an entire service. For example, a transmittal might propose an increase in rates for DS1 channel terminations in an incumbent LEC's "High Capacity and DDS" service category while decreasing the rates for DS3 channel terminations. Even if the weighted average of the rate changes is negative, a customer that purchases only access services that use DS1 channel terminations will see a rate increase. Pacific Telesis's interpretation of Section 204(a)(3) would allow an incumbent LEC to increase rates for some of its customers on only seven days' notice simply by packaging the rate increase with offsetting rate decreases for other customers.

Pacific Telesis's interpretation would result in some customers facing rate increases on only seven days' notice, undermining the added protection that Congress provided for customers facing rate increases. Congress clearly intended that the Commission would have additional time for the review of tariffs that proposed to increase customers' rates. Because only transmittals that consist exclusively of rate decreases can be guaranteed to reduce rates for affected customers, the Commission must require that any transmittal that combines rate increases and decreases be filed on 15 days' notice. The seven day notice period should be reserved for true rate decreases.

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[36]Pacific Telesis Comments at 20.

VI. PCI Information Should Be Filed In Advance

There is widespread support for the Commission's proposal to require incumbent LECs to file their tariff review plan materials and cost support data in advance of their annual access filings. Commenters agree that incumbent LECs should file their exogenous cost development, price cap indexes (PCIs), and service band indexes in advance of the actual rates. In addition, LECs should be required to file any mid-year exogenous changes to price cap indexes in advance of rate changes. MCI agrees with AT&T's proposal that LECs should be required to provide PCI calculations at least 30 days in advance of any mid-term changes to their price cap indices.[37]

The incumbent LECs, with the exception of Ameritech, oppose the requirement for advance filing of PCI changes. BellSouth, for example, argues that the Commission's proposal involves "effectively extending the notice period of the tariff filing."[38] The Commission should reject this argument. As MCI showed in its initial comments, the PCI calculations are severable and distinct from the actual rate changes.[39] They simply provide information that the Commission needs to evaluate subsequent rate changes, including, but not limited to, the annual access filing. Requiring incumbent LECs to file

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[37]AT&T Comments at 18-19.

[38]BellSouth Comments at 17.

[39]MCI Comments at 27-28.

PCI calculations in advance of the proposed rates in no way interferes with their right to change rates on 7 or 15 days' notice.

The Commission should likewise reject the incumbent LECs' argument that PCI calculations are becoming less controversial and that advance filing of TRP information is therefore unnecessary.[40] In the most recent annual access filing, the Commission suspended LEC tariff changes and instituted an investigation because it found that exogenous changes due to the rate base treatment of OPEBs raised significant questions of lawfulness. As Sprint notes, "history demonstrates that many of the problems with past LEC annual access tariff filings have arisen in the area of exogenous cost changes."[41] The Commission and the public should therefore have sufficient time to determine whether the incumbent LEC has correctly applied Commission rules in calculating its new PCIs.

VII. Section 204(a)(3) Does Not Require Elimination or Modification of the Commission's Part 69 Rate Structure Rules

Some incumbent LECs argue that the Commission should eliminate its Part 69 access charge rules in this proceeding.[42] GTE, for example, asserts that "[r]equiring Part 69 waivers impermissibly extends the statutory 7 or 15 day notice period." However,

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[40]See, e.g., U S West Comments at 17.

[41]Sprint Comments at 9.

[42]See, e.g., NYNEX Comments at 6-7; GTE Comments at 8.

nothing in Section 204(a)(3) requires the Commission to eliminate the Part 69 rate structure. The Commission's authority to prescribe the rate structure for switched access services derives from Section 205 of the Act,[43] which was not amended by the 1996 Act. The Commission should only consider changes to its Part 69 access charge rules in the context of its upcoming access charge reform proceeding.

VIII. The Section 204(a)(3) Tariff Review Procedures Should Be Applied Only To Incumbent LECs

Time Warner, AT&T, BellSouth, and U S West raise the issue of whether the tariff review procedures prescribed by Section 204(a)(3) apply to all local exchange carriers, or only to incumbent local exchange carriers.[44] Time Warner notes that the Act's definition of "Local Exchange Carrier" is "any person that is engaged in the provision of telephone exchange service or exchange access," and that Section 204(a)(3) does not distinguish between incumbent local exchange carriers and other local exchange carriers.[45]

MCI agrees with AT&T's statement that "it would not be reasonable to conclude that Congress, as an element of its effort to stimulate competition in the 1996 Act,

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[43]In the Matter of MTS and WATS Market Structure, Fourth Supplemental Notice of Inquiry and Proposed Rulemaking, 90 F.C.C. 2d 135, 256.

[44]Time Warner Comments at 2-3; AT&T Comments at 4 n. 6; U S West Comments at ; BellSouth Comments at .

[45]Time Warner Comments at 2.

actually sought to increase the required notice periods for non-dominant carriers' tariff filings to 7 or 15 days."[46] If, however, the Commission determines that Section 204(a)(3) does apply to all LECs, the Commission should use its Section 10(a) authority to forbear from applying Section 204(a)(3) to nondominant providers of interstate access services. Because nondominant providers of interstate access services do not have market power, it is clear that the Section 10(a) tests are satisfied. However, as MCI has argued in other proceedings, Section 10(a) does not authorize the Commission to adopt a mandatory forbearance policy and preclude nondominant LECs from filing tariffs. The Commission must continue to allow nondominant access providers to file tariffs on one day's notice.

IX. Electronic Filing of Tariffs

In the Notice, the Commission proposed the establishment of an electronic filing system for LEC tariffs, and solicited comment on manner in which such a system should be administered. MCI supports the establishment of such a system, but believes that it should not be instituted without further study. Commenters that addressed this issue expressed a wide range of views concerning the software that should be employed, the implications for tariff filing procedures, and the entity that should administer the system. Accordingly, MCI supports Sprint's suggestion that the Commission engage in further

[46]AT&T Comments at 4 n.6.

study of its proposed electronic tariff filing system, with the assistance of industry groups, and then release a more detailed proposal for public comment.[47]

X. Conclusion

MCI requests that the Commission promulgate regulations implementing the LEC tariff streamlining provisions of Section 402(b)(1)(A) of the Communications Act that are consistent with the above comments and MCI's initial comments.

Respectfully submitted,
MCI TELECOMMUNICATIONS CORPORATION

Alan Buzacott
1801 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 887-3204

October 24, 1996

[47]Sprint Comments at 5-6.

STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on October 24, 1996.

Alan Buzacott
1801 Pennsylvania Avenue, NW
Washington, D.C. 20006
(202) 887-3204

CERTIFICATE OF SERVICE

I, Stan Miller, do hereby certify that copies of the foregoing "MCI Comments" were sent via first class mail, postage paid, to the following on this 24th day of October, 1996.

Jerry McKoy**
Common Carrier Bureau
Federal Communications Division
Room 518
1919 M Street, NW
Washington, DC 20554

International Transcription Service**
2100 M Street N.W.
Suite 140
Washington, D.C. 20037

Carolyn C. Hill
ALLTEL Telephone Services Corporation
655 15th Street, N.W.
Suite 220
Washington, DC 20005

Emily Williams
Association for Local Telecommunications Services
1200 19th Street, NW
Washington, DC 20036

Andrew D. Lipman
C. Joel Van Over
Swidler & Berlin
3000 K Street, NW
Suite 300
Washington, DC 20007

Charles H. Helein
Helein & Associates
8180 Greensboro Drive, Suite 700
McLean, VA 22102

Charles C. Hunter
Catherine M. Hannan
Hunter & Mow, P.C.
1620 I Street, NW
Suite 701
Washington, DC 20006

Catherine Wang
Tamar Haverty
Swidler & Berlin
3000 K Street, NW
Suite 300
Washington, DC 20007

Mitchell F. Brecher
Fleischmann and Walsh, L.L.P.
1400 Sixteenth Street, NW
Washington, DC 20036

Danny E. Adams
Kelley Drye & Warren LLP
1200 Nineteenth St., NW
Suite 500
Washington, DC 20036

Michael H. Shortley, III
Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Andrew D. Lipman
Russell M. Blau
Swidler & Berlin
3000 K Street, NW
Suite 300
Washington, DC 20007